APPEAL NO. 92133
FILED MAY 18,1992

On January 15 and February 18, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as the hearing officer. The main issue at the hearing was whether the claimant sustained a compensable injury on (date of injury), when (Carrier One) was the employer's workers' compensation insurance carrier, or on August 5, 1991, when (Carrier Two) was the employer's workers' compensation insurance carrier. The employer had changed coverage from Carrier One to Carrier Two on July 1, 1991. The hearing officer determined that the claimant sustained a compensable injury on (date of injury), while working for the employer, doing business as AT, and ordered Carrier One to pay temporary income benefits and medical benefits to the claimant as and when they accrue in accordance with the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Carrier One appeals the hearing officer's decision contending that the evidence establishes that the claimant sustained a repetitive trauma injury on August 5, 1991.

Carrier One requests that we reverse the hearing officer's decision in part and render a decision that Carrier Two is liable for all benefits due claimant. Claimant and Carrier Two request that we affirm the hearing officer's decision.

DECISION

The hearing officer's decision is affirmed.

Article 8308-1.03(27) defines "injury" as "damage or harm to the physical structure of the body and those diseases and infections naturally resulting from the harm. The term also includes "occupational diseases." An occupational disease includes repetitive trauma injuries. Article 8308-1.03(36). A "repetitive trauma injury" is defined as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Article 8308-1.03(39). The date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Article 8308-4.14.

The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e) and (g). When presented with conflicting testimony, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witnesses. R. J. McGalliard v. Kulmon, 722 S.W.2nd 694, 697 (Tex. 1987). The trier of fact also judges the weight to be given expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2nd 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The employer in this case repairs and replaces vehicle transmissions. On or about

August 15, 1991, the claimant filed with the Texas Workers' Compensation Commission an Employee's Notice of Injury or Occupational Disease ("NICC") in which he claimed that he sustained a lumbar strain as a result of "picking up transmissions" at work on (date of injury), and that "lost time" began on August 5, 1991. Claimant was 17 years of age at the time of the alleged accident. Carrier One admitted that it was the employer's workers' compensation insurance carrier on (date of injury), and Carrier Two admitted that it was the employer's carrier on August 5, 1991. Both carriers represented that they had been contributing to the payment of claimant's medical benefits and temporary income benefits on an equal basis.

The issue raised but not resolved at the benefit review conference (BRC) was "[w]hether the date of injury was (date of injury), or August 10, 1991." After lengthy discussion with the parties, the hearing officer stated that the issues to be resolved at the contested case hearing were: (1) compensability; (2) whether the issue of compensability was "raised in a timely fashion within 60 days;" (3) the "ultimate" date of injury; and, (4) which carrier had the "workers' compensation coverage at that time." No objection was made to the hearing officer's statement of the issues.

Claimant's position was that he sustained a compensable injury on (date of injury), that he gave timely notice of his injury to his employer, and that Carrier One had waived its right to contest compensability. Carrier One's position was that: (1) there was no on-the-job injury on (date of injury); (2) timely notice of injury was not given; (3) if an injury occurred on (date of injury), no benefits were due because there was no lost time until a second injury occurred; (4) claimant was reinjured by a repetitive trauma injury on or about August 5, 1991; and, (5) Carrier Two was liable for claimant's benefits since it was the carrier on August 5, 1991.

Carrier Two's position was that: (1) claimant sustained an injury on (date of injury); (2) the (date of injury) injury is the producing cause of claimant's "permanent medical impairment;" (3) claimant gave timely notice to his employer of the (date of injury) injury; (4) Carrier One had waived its right to contest the injury of (date of injury); (5) no contribution of benefits is due from Carrier Two; and, (6) Carrier Two is due reimbursement from Carrier One for benefits paid to the claimant.

The hearing officer made findings of fact to the effect that: (1) claimant injured his back on (date of injury), while lifting transmissions; (2) on (date of injury) claimant reported his injury to his supervisor and to the owner of the business; (3) claimant sent his NICC to the Commission and to Carrier One on August 15, 1991; (4) claimant alleged a date of injury of (date of injury), and he never amended his claim to allege a repetitive trauma injury; (5) Carrier One did not controvert claimant's claim prior to the BRC held on November 6, 1991; and, (6) Carrier One presented no evidence to establish that its "contest of compensability" was based on evidence that could not have been reasonably discovered earlier. The hearing officer concluded that: (1) the claimant sustained a compensable injury on (date of injury), and is entitled to income and medical benefits as a result of his injury; (2) Carrier

One was the employer's workers' compensation insurance carrier on (date of injury);, (3) Carrier One waived its right to contest compensability under Article 8308-5.21(a); (4) Carrier One was not entitled to reopen the issue of compensability; and, (5) Carrier One is responsible for payment of all income and medical benefits due claimant, and will reimburse Carrier Two for benefits paid by Carrier Two pursuant to Article 8308-6.15(g).

In its request for appeal, Carrier One does not complain of any of the hearing officer's findings or conclusion, but contends that the facts, expert opinions, and admissions "clearly meet the predicate established by law as to constitute a compensable injury by repetitive trauma activity," and that Carrier Two is responsible for all benefits due claimant "as a result of the repetitious trauma injury he suffered on or about August 5, 1991." Carrier One also contends that it is due reimbursement from Carrier Two for benefits it paid to claimant.

The evidence in this case consisted of the testimony of the claimant, the owner of the company, and a claims adjustor for Carrier Two, as well as documentary evidence presented by the claimant and Carrier Two. The claimant testified as follows: He had been working for the employer for several months when, on the morning of (date of injury), he hurt his back after picking up several transmissions and putting them on a five foot high jack. That afternoon he told his brother, LF, who was his supervisor at work, that he had hurt his back. His brother told him to sit in the break room which he did from 1:00 p.m. to 5:00 p.m. That same day, claimant called Dr. Mc to find out if the doctor would give him something for his pain. Dr. Mc told him there was nothing he could do unless he saw him. During the afternoon of that day, claimant also told the owner of the company, Mr. M, that he had hurt his back. Over the next few days, claimant took aspirin and pain pills that had been prescribed for his stepfather. Although his back hurt and he experienced off and on pain over the next several months, claimant continued to work because he needed the money to support his family, including his recent baby. His brother helped him get by at work by lifting the heavier ends of the transmissions. By August 5th his back pain got so bad he had to take off work to see Dr. Mc. This was his first visit to a doctor for his back problem and the first day he missed work because of his back pain. He told Dr. Mc that his back had started hurting around (date of injury) and had continued to hurt since then. He didn't know why the doctor indicated in his report that his back had started hurting two months ago. When he told the owner of the company that the doctor had told him to take three to seven days off work, the owner told him he had not hurt his back at work. Later in August, claimant talked to a Commission ombudsman and then, on August 15th, sent his NICC, in which he claimed a date of injury of (date of injury), to the Commission by certified mail. He also sent a copy of his NICC to Carrier One by certified mail on the same day. He received both return receipt green cards back showing delivery to the Commission and Carrier One. The first he heard from Carrier One was on October 7th when a claims adjustor took his statement. At the BRC on November 9, 1991, Carrier One said it had not received notice of his injury until September or October, so claimant showed the parties and benefit review officer the return receipt green card from Carrier One showing that it had received a copy of his NICC in August. He lost that green card prior to the hearing. He never received a written notice from Carrier One that it was controverting his claim for a

(date of injury) injury. He also saw Dr. G in August for his back problem. That doctor referred him for physical therapy. He can not work now because of his back problem.

The owner of the company testified that neither the claimant nor the claimant's brother had ever told him of a back injury to claimant occurring in March of 1991. He recalled that the claimant had spent some time in the break room in March, but said it was due to a stomach problem. He said the claimant's brother told him that the claimant was sick on August 5th, and that the next day the claimant told him he had hurt his back. He also said that the claimant had been doing his normal job and had not appeared to have a back problem.

The transcribed recorded statement of the claimant's brother was in evidence. He stated to the effect that the claimant told him in March that he had hurt his back picking up something; that the claimant had to stay in the break room one afternoon because of his back pain; and that he thought he had told the owner that claimant's back was hurting real bad.

In a medical report on the claimant dated August 19, 1991 (for a visit of August 5, 1991), Dr. Mc diagnosed a lumbar strain and stated the history of the injury as "[p]atient stated while at work as a mechanic he started having pain to his low back 2 months ago. Steadily getting worse." In a report dated August 27, 1991, Dr. G stated that he suspected that the claimant had either lumbar strain or discogenic pain, and stated the history of the injury as "[h]e was having trouble in March and had to work in the office for several days and basically got over his back pain. He then did well until August when he again developed back pain at work. He has had trouble ever since and has had to be off work since August 5th." In a subsequent report dated December 9, 1991, Dr. G stated "I suspect that his [claimant's] pain is on the basis of the (sic) this spondylolysis and when he lifted in March, he developed the low back pain that was progressive and eventually led to him having to take off work in August because of the persistent pain." On January 3, 1992, Dr. G responded to a letter from Carrier One's attorney wherein he was asked to give his opinion on several matters based on the assumption that the claimant recovered from his initial back pain in March, had no problems in the interim, and then again developed back pain at work in August. Based on that assumption, Dr. G stated that it was difficult to assign claimant's current pain solely to the incident in August, and that he could not rule out contribution from any injury in March, although it appeared to him, based on the claimant's pattern of behavior after the two incidences, that the one in August was the more proximate cause of his medical problems. An evaluation report from (clinic) dated January 13, 1992, indicated that the claimant had reported injuring his back on (date of injury) when he lifted a transmission. In an undated report of medical evaluation which gave the date of claimant's injury as August 10, 1991, Dr. G indicated that the claimant had reached maximum medical improvement on January 22, 1992, and assigned a whole body impairment rating of five percent. In that report, Dr. G noted that he had originally seen the claimant on August 27, 1991, for an on-the-job injury on August 10, 1991, and that the claimant had reported lifting a transmission weighing approximately 150 pounds just prior to the onset of his low back pain.

In his answers to written questions, Dr. G indicated that it was his opinion that the claimant's work after (date of injury) was an aggravating factor to his present back condition, and that the claimant's back condition was the result, to some degree, of both a traumatic incident on (date of injury) and repetitious physical trauma.

As previously noted Carrier One's position at the hearing was that the claimant did not sustain an on-the-job injury on (date of injury), but instead, took the position that the claimant sustained a repetitive trauma injury on or about August 5th. The claimant and Carrier Two took the position that the claimant sustained a compensable injury on (date of injury). Carrier One has not challenged the sufficiency of the evidence supporting the hearing officer's determination that claimant was injured at work on (date of injury) or his conclusion that the (date of injury) injury was a compensable injury. As a general rule, where the sufficiency of the evidence supporting the trial court's findings of fact has not been challenged, an appellate court will accept the findings as a correct recitation of the facts. Trevino v. Munoz, 583 S.W.2nd 840, 843 (Tex. Civ. App.-San Antonio 1979, no writ). In our opinion the evidence in this case was conflicting as to the cause of the claimant's back problem either from accidental injury on (date of injury) or repetitive trauma injury culminating on August 5th, and the hearing officer might have arrived at inferences other than he did. However, the fact that the trier of fact might have arrived at other inferences and conclusions does not justify the setting aside of the trier of fact's determination of those facts he concluded to be the most reasonable. Holly Sugar Company v. Aguirre, 487 S.W.2nd 421, 425 (Tex. Civ. App.-Amarillo 1972, writ ref'd n.r.e.). When the evidence is such that it would support a verdict either way, a reviewing court cannot substitute its own findings for those of the trier of fact. Worth Finance Company v. Charlie Hill Motor Co., 131 S.W.2nd 416, 420 (Tex. Civ. App.-Fort Worth 1939, no writ). We overrule Carrier One's contention that the evidence established as a matter of law that the claimant sustained a compensable repetitive trauma injury on or about August 5, 1991.

We do not reach Carrier Two's question concerning the application of Article 8308-4.30 (Contributing Injury) to only earlier compensable injuries, since no compensable injury other than that of (date of injury), was found in this case. We have previously determined that Article 8308-4.30 reduces a carrier's liability for only impairment and supplemental income benefits. *See* Texas Workers' Compensation Commission Appeal No. 91030 (Docket Nol AM-00020-917-CC-2) decided October 30, 1991.

Finding no merit in the appellant's contention, we affirm the hearing officer's decision.

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Robert W. Potts
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge